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Date: September 14, 2010

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Subject : The Delta Stewardship Council's Roles and Responsibilities Under the California Environmental Quality Act Regarding Approval of the Delta Plan

I. INTRODUCTION

Water Code section 85300, subdivision (a) requires the Delta Stewardship Council (Council), by January 1, 2012, to “develop, adopt and implement” a “comprehensive, long-term management plan for the Delta” which furthers the co-equal goals of “providing a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem” (Delta Plan). (Water Code, §§ 85300, subd. (a), 85054, 85059.) Per your request, this memorandum discusses the Council’s responsibilities under the California Environmental Quality Act (CEQA) as the lead agency for preparation, adoption and implementation of the Delta Plan.

In summary, we conclude that CEQA requires preparation of an environmental impact report (EIR) for the Council’s adoption of the Delta Plan, since that plan is a discretionary action directly undertaken by a state agency which may have substantial and reasonably foreseeable direct and indirect physical effects on the environment. Moreover, because the Delta Plan will be approved by the Council and have a legally binding effect on subsequent actions, it does not qualify for the feasibility and planning studies exemption from CEQA. Nor does the Delta Plan qualify for any other CEQA exemption. Based on these conclusions, we also summarize the Council’s duties under CEQA as lead agency for preparation of a Delta Plan EIR.

II. APPLICABILITY OF CEQA TO THE DELTA PLAN

A. Whether the Delta Plan Is a Project That May Cause Direct or Indirect Physical Changes in the Environment

A lead agency is responsible for determining whether an EIR, negative declaration, or mitigated negative declaration is required for any project subject to CEQA. (Pub. Resources Code, § 21080.1, subd. (a); Cal. Code Regs., tit. 14, § 15050, subd. (c).) CEQA requires every state lead agency to prepare an EIR for each discretionary project proposed by the agency

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which *may* have a significant effect on the environment. (Pub. Resources Code, §§ 21080, subds. (a) and (d), 21000, subd. (a).) The CEQA statute and Guidelines define a “project” broadly as “an activity which may cause either a direct physical change, . . . or a reasonably foreseeable indirect physical change[,] in the environment” and which is any one of the following:

- 1) An activity directly undertaken by a public agency;
- 2) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance through one or more agencies;
- 3) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(Pub. Resources Code, § 21065; Cal. Code Regs., tit.14, § 15378, subd. (a).)

Because Water Code section 85300, subdivision (a) requires the Council to “develop, adopt and implement” the Delta Plan, the plan qualifies as “an activity directly undertaken by a public agency.”¹ Thus, the key question is whether the plan “may cause either a direct physical change, . . . or a reasonably foreseeable indirect physical change[,] in the environment,” and thus qualify as a “project” subject to CEQA. (Pub. Resources Code, § 21065; see also Cal. Code Regs., tit. 14, § 15060, subd.(c).) In order to answer this question, one must look to the provisions of SB 1 which set forth the purpose of the Delta Plan and how the plan is to be implemented.

SB 1 defines the Delta Plan as “comprehensive, long-term management plan for the Delta as adopted by the Council in accordance with this division.” (*Id.*, § 85059.) The fundamental purpose of the Delta Plan is to further the co-equal goals of SB 1 to provide “a more reliable water supply for California” and to protect, restore and enhance the Delta ecosystem. (Water Code, §§ 85054, 85300, subd. (a).) Accordingly, the Delta Plan must include specified “measures to promote a more reliable water supply” and “subgoals and strategies for restoring a healthy ecosystem.” (*Id.*, § 85302, subds. (d) and (e).) The Delta Plan must include “options for new and improved infrastructure relating to the water conveyance in Delta, storage systems, and for the operation of both to achieve the co-equal goals.” (*Id.*, § 85304.) The plan also must include recommended “priorities for state investments in levee operation, maintenance and improvements in the Delta,” and may include local flood protection

¹ Furthermore, because the Council’s preparation and adoption of the Delta Plan pursuant to Water Code section 85300 “requires the exercise of judgment or deliberation” by the Council, as opposed to merely determining “whether there has been conformity with applicable statutes, ordinances or regulations,” the Council’s action likewise is a discretionary agency action, which is also a basic predicate to the applicability of CEQA. (See Cal. Code Regs., tit. 14, § 15357.)

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plans. (*Id.*, §§ 85306, 85307, subd. (b).) The plan likewise may incorporate “additional actions to address the needs of Delta energy” development, storage, and distribution. (*Id.*, § 85307, subd. (d).) Among other requirements, the Delta Plan must include “quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan,” and describe “the methods by which the Council shall measure progress toward achieving the co-equal goals.” (*Id.*, § 85308, subds. (b) and (d); see also *id.*, § 85211.)

Water Code section 85302, subdivision (a) requires the Delta Plan actually to be implemented to achieve the co-equal goals. Once implemented, these goals of the Delta Plan clearly will have physical environmental effects. SB 1 requires that the Delta Plan include specific implementation measures and calls for a plan that is “legally enforceable.” (Water Code §§ 85001, subd. (c), 85302, subds. (d) and (e).) To that end, SB 1 requires that the Delta Plan include a “compliance mechanism.” (*Id.*, § 85300, subd. (d) (1) (A).)

Perhaps most importantly, among other things, SB 1 establishes a consistency review process that will ensure that state and local government actions comply with the Delta Plan. (Water Code, § 85225 et seq.) Under this procedure, a state or local government agency must certify to the Council that certain “covered actions,” as defined in Water Code section 85057.5, are consistent with the Delta Plan. (*Id.*, § 85225.) Any “person who claims that a proposed covered action is inconsistent with the Delta Plan” and that the inconsistency will “have a significant adverse impact on the achievement of one or both of the co-equal goals or implementation of government-sponsored flood control programs” in the Delta, may appeal the state or local government’s consistency certification to the Council within 30 days of submission of the consistency certification. (*Id.*, §§ 85225.10, subd. (a), 85225.15.) Water Code section 85022, subdivision (a) also states that “[i]t is the intent of the Legislature that state and local land use actions identified as ‘covered actions’ . . . be consistent with the Delta Plan.”

Therefore, for all these reasons, the Delta Plan will foreseeably result in both direct and indirect physical changes in the environment.² As a result, we conclude that the Council’s adoption of the Delta Plan is a “project” subject to CEQA.

² The courts have repeatedly held that an agency’s adoption of a planning document qualifies as “project” under CEQA where the plan either will culminate in, or will ultimately result in, physical changes to the environment. (See, e.g., *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 277-279 (LAFCO approval of city annexation is a project because it is a necessary step in a chain of events that would ultimately have a physical impact on the environment); *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 796-798 (creation of new school district is a project because it would ultimately lead to construction of a new school and other actions that may have an environmental effect); *City of Livermore v. Local Agency Formation Commission* (1986) 184 Cal.App.3d 531, 538-539 (LAFCO revisions to local government sphere of influence guidelines constitutes a project because the guidelines would influence LAFCO’s future annexation decisions which in turn would affect future development patterns); *City of Sacramento v. State Water Resources*

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B. Whether the Delta Plan Is Exempt From CEQA

The next step in the analysis is to consider the applicability of any statutory or categorical exemptions from CEQA to the Council's adoption of the Delta Plan. In some circumstances, a proposed agency action that otherwise qualifies as a discretionary "project" under CEQA nevertheless may be exempt from that statute.

The question has arisen whether the Delta Plan qualifies for the so-called "feasibility studies" statutory exemption from CEQA. Public Resources Code section 21102 allows a state agency, without first preparing an EIR, to authorize funds for expenditure for "a project involving only feasibility or planning studies for possible future actions which the agency, board, commission has not approved, adopted or funded" CEQA Guidelines section 15262 further provides that "[a] project involving only feasibility or planning studies which the agency, board, or commission has not approved, adopted or funded does not require the preparation of an EIR or negative declaration but does require consideration of environmental factors. This section does not apply to the adoption of a plan that will have a legally binding effect on later activities."

The feasibility and planning studies exemption does not apply to the Council's adoption of the Delta Plan, for two reasons. First, on its face, the exemption in Public Resources section 21102 and CEQA Guidelines section 15262 "applies only to studies that, among other things, have not been adopted by the agency." (*Edna Valley*, *supra*, 67 Cal.App.3d at p. 448.) Yet, Water Code section 85300, subdivision (a) *requires* the Council to adopt and implement the Delta Plan. Second, for the reasons described in the foregoing section, the Delta Plan will have a "legally binding effect on later activities" and is therefore not merely a non-binding feasibility or planning study. (Cal. Code Regs., tit. 14, § 15262.)

The only other even remotely potentially applicable CEQA exemptions (either statutory or categorical) are the categorical exemptions in CEQA Guidelines section 15307 (Actions By Regulatory Agencies for Protection of Natural Resources) and section 15308 (Actions By Regulatory Agencies for Protection of the Environment). However, these exemptions likewise do not apply to the Council's adoption of the Delta Plan because by statute that plan is far broader than just a plan to protect the Delta ecosystem and must also involve strategies to

Control Bd. (1992) 2 Cal.App.4th 960, 972 (Regional Water Quality Control Board plan governing use of pesticides on rice fields is a project because it has potential for causing physical change to the environment); *Edna Valley Assn. v. San Luis Obispo County* (1977) 67 Cal.App.3d 444, 448 (local transportation authority's adoption of regional transportation plan is a project because it "potentially and ultimately have a great effect upon environment within San Luis Obispo County"); *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 531-532 (amendment of a general plan is a project because general plans "embody fundamental land use decisions that guide the future growth and development of cities and counties").)

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provide for a more reliable water supply for California. (Water Code, §§ 85054, 85300, subd. (a), 85302, subd. (d), 85304.) Moreover, a categorical exemption may “not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (Cal. Code Regs., tit. 14, § 15300.2, subd. (c).) For the reasons explained above and below, a reasonable possibility of a significant effect exists here.³

C. *Whether the Environmental Effects of the Delta Plan May Be Significant*

The final step in the CEQA analysis is to determine whether any physical changes in the environment that may be caused by the Delta Plan could reasonably be viewed as potentially significant. A state lead agency is required to prepare an EIR for each discretionary project that *may* have a significant effect on the environment. (Pub. Resources Code, §§ 21080, subd. (d), 21100, subd. (a).) “The word ‘may’ connotes a ‘reasonable possibility’” that a project will have a significant environmental impact. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 n. 16.)

The CEQA Guidelines define a “significant effect on the environment” as a “substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” (Cal. Code Regs., tit. 14, § 15382, emphasis added; see also Pub. Resources Code, § 21068.) A lead agency’s determination of the significance of environmental effects is governed by the criteria in CEQA Guidelines sections 15064 and 15065 and Public Resources Code section 21083, subdivision (b).

The lead agency may adopt a negative declaration “only if it finds on the basis of the whole record before it (including the initial study and comments received) that there is *no* substantial evidence that the project will have a significant effect on the environment.” (Cal. Code Regs., tit. 14, § 15074, subd. (b), emphasis added and § 15070, subd. (a); see Pub. Resources Code, § 21080, subs. (c)(1) and (d).) In determining whether the project will or will not have a significant environmental effect, the lead agency must consider direct physical changes and reasonably foreseeable indirect physical changes in the environment which may be caused by the project, as well as the project’s cumulative effects. (Cal. Code Regs., tit. 14, § 15064, subs. (d), (h)(1).) However, “[i]f there is disagreement among expert opinion supported by facts over the significance of an effect . . . the lead agency shall treat the effect as significant and prepare an EIR.” (*Id.*, § 15064, subd. (g).) A lead agency also must find that a

³ Indeed, even Delta restoration activities, on the scale envisioned by the Legislature in the Delta Plan, will have reasonably foreseeable significant environmental effects. (See, e.g. Water Code, § 85302, subd. (e)(1) and (e)(4) [Delta Plan must include subgoals and strategies for restoring “large areas of interconnected habitats within the Delta and its watershed by 2100” and restoring Delta flows and channels].)

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project will have a significant environmental effect when any one or more of the conditions specified in CEQA Guidelines section 15065, subdivision (a) occur.⁴

If “there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial,” the lead agency *shall* prepare an EIR. (Cal. Code Regs., tit. 14, § 15063, subd. (b)(1); see also *id.*, § 15064, subds. (a)(1), (f)(1); Pub. Resources Code, § 21080, subd. (d).) Thus, “if the lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.” (Cal. Code Regs., tit. 14, § 15064, subd. (f)(1).) The courts have repeatedly described this standard as a “low threshold for preparation of an EIR, reflecting a preference to resolve doubts in favor of full-blown environmental review.” (*Sierra Club v. Dept. of Forestry and Fire Protection* (2007) 150 Cal.App.4th 370, 381.)

The Council’s adoption of the Delta Plan satisfies the low threshold for preparation of an EIR for the same reasons that the Delta Plan qualifies as a “project” under CEQA. Given the statutorily prescribed breadth and scope of the Delta Plan and its central role in achieving the co-equal goals of “providing a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem” (see Water Code sections 85054, 85300, subd. (a), 85302-85308) – and particularly the requirement that the plan “promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the co-equal goals” (*id.*, § 85304) -- there is substantial evidence of at least a “reasonable possibility” that the Delta Plan will have a “substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by” the plan. (Cal. Code Regs., tit. 14, § 15382; Pub. Resources Code, § 21068; *Sundstrom*, 202 Cal.App.3d at p. 309.)

This conclusion comports with the oft-declared general rule that CEQA is “to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language,” and the concomitant principle requiring any doubts to be resolved in favor of preparing an EIR. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; *Sierra Club, supra*, 150 Cal.App.4th at p. 381.) Finally, “[t]he application of CEQA to the adoption or amendment of [the Delta Plan] also comports

⁴ Section 15065 sets forth certain circumstances under which a lead agency must make a “mandatory finding of significance” for purposes of preparation of an EIR, among other things. Of particular relevance to the Delta Plan is the requirement that the lead agency prepare an EIR where “[t]he project has possible environmental effects that are individually limited but cumulatively considerable. ‘Cumulatively considerable’ means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (Cal. Code Regs., tit. 14, § 15065, subd. (a)(3).)

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with the policy that the environmental consequences of a proposed activity, whether public or private, be considered at the earliest possible stage.” (*City of Santa Ana, supra*, 100 Cal.App.3d at p. 533; see also *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135 [CEQA review must “be done early enough to serve, realistically, as a meaningful contribution to public decisions”].)

For all of these reasons, we conclude that the Council’s adoption of the Delta Plan requires preparation of an EIR.

III. COUNCIL’S DUTIES AS LEAD AGENCY FOR PREPARATION OF DELTA PLAN EIR

In light of the foregoing conclusions, below we summarize the Council’s roles and responsibilities under CEQA as lead agency for preparation of the Delta Plan EIR.

A. Council Determination to Prepare EIR, Notice of Preparation and Scoping

The Council should determine to prepare an EIR “as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.” (Cal. Code Regs., tit. 14, § 15004, subd. (b); see generally *Save Tara, supra*, 45 Cal.4th at pp. 129-131.) The Council therefore must “incorporate environmental considerations into project conceptualization, design and planning” “at the earliest feasible time.” (Cal. Code Regs., tit. 14, § 15004, subd. (b)(1).) Preparation and review of an EIR also “should be coordinated in a timely fashion with the existing planning, review, and project approval processes” being utilized by the Council. (*Id.*, subd. (c).) These procedures, “to the maximum extent feasible,” should “run concurrently, not consecutively.” (*Id.*) The CEQA Guidelines provide that, if a lead agency determines that an EIR “clearly will be required for a project,” it may skip initial CEQA review of the project and “begin work directly on the EIR process.” (Cal. Code Regs., tit. 14, § 15060, subd. (d).)

In this case, the Council may elect to prepare a program EIR, which would be particularly appropriate for the Delta Plan. A program EIR is prepared for “a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, [or] (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program.” (Cal. Code Regs., tit. 14, § 15168, subd. (a).) The CEQA Guidelines describe a number of advantages to preparation of a program EIR, such as: (1) providing “for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action;” (2) ensuring full consideration of cumulative impacts; (3) avoiding “duplicative reconsideration of basic policy considerations;” and (4) allowing for consideration of “broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.” (*Id.*, § 15168, subd. (b).)

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The EIR process starts with a decision by the lead agency to prepare an EIR. (Cal. Code Regs., tit. 14, § 15081.) Once the Council determines that an EIR is required for the Delta Plan, it “shall immediately send a notice of that determination by certified mail or an equivalent procedure to each responsible agency,” the OPR and all trustee agencies (as defined in Pub. Resources Code, § 21070). (*Id.*, § 21080.4, subd. (a); Cal. Code Regs., tit. 14, § 15082, subd. (a).) Upon the Council’s request, OPR will provide assistance in identifying the various responsible and trustee agencies for the Delta Plan. (Pub. Resources Code, § 21080.4, subd. (c); Cal. Code Regs., tit. 14, § 15023, subd. (d).) In addition, the Council must provide and post a public notice of preparation of a draft EIR pursuant to Public Resources Code sections 21092, 21092.2, and 21092.3. The required contents of and other requirements for the notice of preparation are specified in Guidelines section 15082.

The Council, any responsible or trustee agency or OPR may request one or more inter-agency meetings to assist the lead agency in determining “the scope and content of the environmental information” that any of responsible or trustee or other agencies may require. (Pub. Resources Code, § 21080.4, subd. (b); Cal. Code Regs., tit. 14, § 15082, subd. (c).) If such a request is made by an agency other than the Council, the Council must convene the meeting within 30 days of the request. (*Id.*)

Since the Delta Plan would be considered a project of “statewide, regional, or areawide significance,”⁵ the Council also must hold at least one EIR scoping meeting and provide notice of such meeting to responsible and trustee agencies, cities and counties within and adjacent to the project location, and members of the public who have requested such notice pursuant to Public Resources Code section 21083.9, subdivision (b). (Pub. Resources Code, § 21083.9, subd. (a)(2); Cal. Code Regs., tit. 14, § 15082, subd. (c)(1)-(2).)

B. Preparation of Draft Delta Plan EIR, Notice of Completion and Public and Agency Review of Draft EIR

The Delta Plan EIR must either be prepared directly by the Council or by an entity under contract with the Council. (Pub. Resources Code, § 21082.1, subd. (a); Cal. Code Regs., tit. 14, § 15084, subds. (a), (d).) However, the Council must “independently review and analyze” the EIR, circulate “draft documents that reflect its independent judgment,” and certify that the final EIR reflects its independent judgment. (Pub. Resources Code, § 21082.1, subd. (c)(1)-(3); Cal. Code Regs., tit. 14, § 15084, subd. (e).) The lead agency ultimately is

⁵ See criteria in Cal. Code Regs., tit. 14, § 15206. The Delta Plan meets several of these criteria, since it is a project that will likely: (1) cause significant effects beyond a given city or county; (2) “substantially impact” the Sacramento-San Joaquin Delta, as defined in Water Code section 12220; and (3) “substantially affect sensitive wildlife habitats including . . . riparian lands, wetlands, bays, estuaries, marshes, and habitats for endangered, rare and threatened species.” (Cal. Code Regs., tit. 14, § 15206, subd. (b)(2), (4)(E), (5).)

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“responsible for the adequacy and objectivity” of the EIR. (Cal. Code Regs., tit. 14, § 15084, subd. (e).)

For projects of statewide, regional or areawide significance and/or that are subject to state agency review, such as the Delta Plan, the Council must submit the draft EIR to the State Clearinghouse. (Pub. Resources Code, §§ 21082.1, subd. (c)(4), 21083, subd. (d); Cal. Code Regs., tit. 14, §§ 15082, subd. (a), 15205.) Once the Council completes the draft EIR for public and agency review, it must file a notice of completion with OPR. (Pub. Resources Code, § 21161; Cal. Code Regs., tit. 14, § 15372.) The required contents of the notice are specified in Public Resources Code section 21100 and CEQA Guidelines section 15085. At the same time it sends its notice of completion to OPR, the Council also must submit to OPR and circulate a public notice of availability of a draft EIR. (Cal. Code Regs., tit. 14, § 15087, subd. (a).) The contents and publication requirements for the public notice are provided in Guidelines section 15087. The Council also may incorporate by reference all or portions of the BDCP EIR. (Cal. Code Regs., tit. 14, § 15150.) The requirements for incorporation by reference are specified in CEQA Guidelines section 15150.

The minimum public and state agency review period for a draft EIR of statewide significance and/or that is subject to state agency review is 45 days. (Pub. Resources Code, § 21091, subd. (a); Cal. Code Regs., tit. 14, §§ 15087, subd. (e), 15105, subd. (a).) The Guidelines state that the review period generally should not be longer than 60 days “except in unusual situations.” (Cal. Code Regs., tit. 14, § 15105, subd. (a).) “Unusual situations” is not defined, nor has it been interpreted by any case law. A leading CEQA treatise, however, concludes that this language does not constrain an agency’s discretion to circulate a draft EIR for longer than 60 days. (Remy et al., *Guide to CEQA*, 11th ed., Solano Press, p. 348.) This makes sense in light of CEQA’s overarching purpose of fostering informed public participation and providing adequate time for public review and comment. (See, e.g., Cal. Code Regs., tit. 14, §§ 15201, 15203.) In addition, the CEQA Guidelines encourage, but do not require, a lead agency to hold public hearings on the draft EIR. (*Id.*, § 15087, subd. (i).)

Prior to completing the final EIR, the Council must consult with and obtain comments from all responsible and trustee agencies, any other federal, state or local agencies that have “jurisdiction by law with respect to the project or which exercise authority over resources which may be affected by the project,” and any city or county that borders on a city or county within which the project is located.⁶ (Pub. Resources Code, § 21104, subd. (a); Cal. Code Regs., tit. 14, § 15086, subd. (a).) In addition, because the Delta Plan would be a project of statewide, regional or areawide significance, the Council also must consult with transportation planning agencies and public agencies that have transportation facilities within their jurisdictions that could be affected by the project. (Pub. Resources Code, § 21092.4; Cal. Code Regs., tit. 14, §

⁶ The phrase “jurisdiction by law” is defined in CEQA Guidelines section 15366. (Cal. Code Regs., tit. 14, § 15366.)

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15086, subd. (a)(5).) This agency consultation process is to be conducted in conjunction with state agency review of the draft EIR. (Cal. Code Regs., tit. 14, § 15087, subd. (e).)

C. Response to Comments and Preparation and Certification of Final EIR

The Council must consider and respond to all comments received during the public review period, and may consider comments received after the close of the public review period. (Pub. Resources Code, § 21091, subd. (d)(1)-(2)(A); Cal. Code Regs., tit. 14, § 15088, subd. (a).) The Council's response must "describe the disposition of each significant environmental issue" raised by the commentators and meet the requirements for responses to comments in CEQA Guidelines section 15088, subdivision (c). (Pub. Resources Code, § 21091, subd. (d)(2)(B); Cal. Code Regs., tit. 14, § 15088, subd. (c).) The Council must provide "proposed responses" to public agency comments at least ten days prior to certifying the EIR. (Pub. Resources Code, § 21092.5, subd. (a); Cal. Code Regs., tit. 14, § 15088, subd. (b).)

The Council must prepare the final Delta Plan EIR prior to approving the Delta Plan. (Cal. Code Regs., tit. 14, § 15089, subd. (a).) The final Delta Plan EIR must meet all of the requirements of Public Resources Code section 21000, subdivision (b)-(c) and Cal. Code of Regs., tit. 14, Division 6, Article 9 (§ 15120 et seq.) and Article 10 (§ 15140 et seq.). The Council's responses to comments "may take the form of a revision to the draft EIR or may be a separate section in the final EIR," depending upon whether the response "makes important changes in the information contained in the text of the draft EIR." (Cal. Code Regs., tit. 14, § 15088, subd. (d).) The Council may, but is not required, to provide an opportunity for public and/or agency review of the final EIR before approving the Delta Plan. (*Id.*, § 15089, subd. (b).)

Prior to approving the Delta Plan, the Council must certify that: (1) the final EIR has been completed in compliance with CEQA; (2) the Council reviewed and considered the information in the final EIR prior to approving the plan; and (3) the final EIR reflects the Council's independent judgment and analysis. (Cal. Code Regs., tit. 14, § 15090, subd. (a).)

The Council must send copies of the final EIR to the "appropriate planning agency" of every city and county where significant environmental effects may occur and to each responsible agency, and retain one or more copies of the final EIR "for a reasonable period of time." (Cal. Code Regs., tit. 14, § 15095.)

D. Approval of the Delta Plan and Required Findings Concerning Mitigation Measures and Significant Effects

After reviewing the final EIR, the Council may decide "whether or how to approve or carry out" the Delta Plan. (Cal. Code Regs., tit. 14, § 15092, subd. (a).) If the Council approves the Delta Plan, it must file a notice of determination of that approval with OPR within five working days. (Pub. Resources Code, § 21108, subd. (a); Cal. Code Regs., tit. 14, §§ 15094,

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subds. (a), (c), 15373.) Required contents of the notice are set forth in Public Resources Code section 21108 and Guidelines section 15094, subdivision (b). The filing of the notice of determination commences a 30-day statute of limitations for judicial challenges to the adequacy of the Council's EIR under CEQA. (Cal. Code Regs., tit. 14, § 15094, subd. (g); Pub. Resources Code, § 21167, subd. (c).)

Prior to approving the Delta Plan, the Council must ensure that the significant environmental effects of the plan are avoided or mitigated to a level of insignificance whenever feasible. (Pub. Resources Code, §§ 21002, 21002.1, subd. (b).) CEQA provides that the Council should not approve the Delta Plan "if there are feasible alternatives or feasible mitigation measures which would substantially lessen the significant environmental effects of" the plan. (*Id.*, § 21002; see also Cal. Code Regs., tit. 14, §§ 15021, subd. (a)(2), 15092, subd. (b)(2)(A).) However, "[i]f economic, social, or other conditions make it infeasible to mitigate one or more significant effects" of the Delta Plan, "the project may nonetheless be carried out or approved at the discretion of the public agency if the project is otherwise permissible under applicable laws and regulations." (Pub. Resources Code, § 21002.1, subd. (c); see also Cal. Code Regs., tit. 14, §§ 15021, subds. (b), (d), 15043, 15092, subd. (b)(2)(B), 15093, subd. (a).)

Also prior to approving the Delta Plan, the Council must consider the final EIR and make one or more of the following three findings with respect to *each* significant effect identified in the EIR:

- 1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment;
- 2) Changes or alterations that are within another agency's responsibility or jurisdiction have been, or can and should be, adopted by that other agency; or
- 3) Specific economic, legal, social, technological or other considerations make infeasible the mitigation measures or alternatives identified in the EIR and specific overriding economic, legal, social or technological benefits of the project outweigh its significant environmental effects.

(Pub. Resources Code, § 21081, subds. (a)(1)-(3) and (b); Cal. Code Regs., tit. 14, §§ 15004, subd. (a), 15043, 15091, subd. (a), 15093, subd. (a).) These findings must be supported by substantial evidence in the record. (Pub. Resources Code, § 21081.5; Cal. Code Regs., tit. 14, § 15091, subd. (b), 15093, subd. (b).) Finally, if the Council has required implementation of mitigation measures in its findings, it also must adopt a mitigation reporting or monitoring program pursuant to Public Resources Code section 21081.6 and Guidelines section 15097. (See Cal. Code Regs., tit. 14, § 15091, subd. (d).)

Please do not hesitate to let us know if you would like any additional information regarding the Council's role under CEQA regarding the Delta Plan.